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Inc. and USF&G, Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA AT ANCHORAGE

UNITED STATES OF AMERICA for the use of
NORTH STAR TERMINAL & STEVEDORE
COMPANY, d/b/a NORTHERN STEVEDORING
& HANDLING, and NORTH STAR TERMINAL &
STEVEDORING COMPANY, d/b/a Northern
Stevedoring & Handling, on its own behalf,

Plaintiff,

and

UNITED STATE OF AMERICA for the use of
SHORESIDE PETROLEUM INC., d/b/a Marathon
Fuel Service, and SHORESIDE PETROLEUM
INC., d/b/a Marathon Fuel Service, on its own
behalf,

Intervening Plaintiffs,

and

METCO, INC.,

Intervening Plaintiff,

vs.

NUGGET CONSTRUCTION INC.; SPENCER
ROCK PRODUCTS INC.; UNITED STATES
FIDELITY AND GUARANTY COMPANY; and
ROBERT A. LAPORE,

Defendants.

No. 3:98-cv-00009-TMB

NUGGET'S MOTION IN
LIMINE RE: FUNDS
WITHHELD FROM SPENCER

1 I. **INTRODUCTION**

2 Nugget Construction Company ("Nugget") moves the court for an order *in limine*
3 excluding at trial all statements, argument, testimony, documentary or other evidence
4 intended to prove that Nugget "wrongfully intercepted" funds to which Spencer Rock
5 Products, Inc. ("Spencer") was allegedly entitled.

6 II. **BACKGROUND**

7 This litigation arises from a project in Homer, Alaska, on which Nugget was the
8 general contractor. North Star Terminal and Stevedoring Company ("North Star") was a
9 vendor of Spencer, Nugget's rock supplier. At this time, North Star is the only second-
10 tier vendor remaining with claims against Nugget, the other second-tier vendors,
11 Shoreside Petroleum, Inc. ("Shoreside") and Metco, Inc. ("Metco") having settled their
12 claims against Nugget and its surety.

13 During the course of the project, Nugget and Spencer entered into a "Support
14 Agreement" by which Nugget agreed to provide Spencer with labor and equipment to
15 assist Spencer with the performance of its Material Contract obligations.¹ Pursuant to
16 the Support Agreement, Nugget was entitled to deduct from Spencer's progress
17 payments all costs incurred by Nugget in supporting Spencer's performance. In
18 addition to the support costs incurred, Nugget also sustained additional damages as a
19 result of Spencer's failure to provide rock that was in compliance with the contract
20 specifications. Nugget was not only entitled by contract to deduct its support costs, as
21 the authorities discussed herein make clear, Nugget was legally entitled to withhold
22 funds that would have been paid to Spencer as a credit against the costs Nugget
23

24
25 ¹ See Exhibit A attached hereto.

1 incurred to complete the requirements of the Material Contract due to Spencer's
2 nonperformance.

3 III. **ARGUMENT**

4 When a subcontractor or supplier on a federal government project fails to
5 perform, requiring the prime contractor to complete the work, federal law supports the
6 prime contractor's right to retain funds that would have gone to the subcontractor or
7 supplier had it performed the work as an element of the prime contractor's recovery.

8 If a subcontractor fails to perform its contractual obligations without legal
9 justification, it (and its surety, where applicable) is liable to the prime contractor for the
10 resulting damages. *Southern Roofing & Petroleum Co. v. Aetna Ins. Co.*, 293 F. Supp.
11 725, 728-29 (D.C. Tenn. 1968). In fact, the prime contractor is under an obligation to
12 obtain substitute performance, as the contractor remains responsible any delay to the
13 prime contract caused by the subcontractor or supplier's nonperformance. *Signal*
14 *Contracting, Inc.*, DOTCAB 1279, 83-1 B.C.A. ¶16,425.

15 In a case arising from the construction of residential units on an army base, the
16 prime contractor completed the work of its electrical subcontractor following the
17 subcontractor's default, and claimed damages consisting of completion costs, attorney
18 fees and interest. *National Union Fire Ins. Co. of Pittsburgh, Pennsylvania v. D & L*
19 *Construction Co.*, 353 F.2d 169, 171 (8th Cir. 1965). The prime contractor had paid the
20 subcontractor for work performed, but withheld the unpaid balance of the subcontract
21 when the subcontractor defaulted. The court deemed the withholding appropriate as
22 long as those funds were credited against the prime contractor's claim (to prevent a
23 windfall), stating that no authority had been cited "supporting the view that the unpaid
24 balance due on the subcontract should not be credited against the cost of completion."
25

1 353 F.2d at 175. In a case cited by the *National Union Fire Ins. Co.* court involving the
2 construction of a building on a Marine Corps base, the prime contractor had demanded
3 completion of the applicable work from its subcontractor and the subcontractor's surety
4 following the subcontractor's default. Both refused to complete the work, and so the
5 prime contractor did so at its own expense. *Dale Benz, Inc. Contractors v. American*
6 *Cas. Co.*, 303 F.2d 80, 82 (9th Cir. 1962). The court held that the prime contractor was
7 entitled to the unpaid balance of the subcontract, as well as the remainder of its actual
8 completion costs, plus 10%. *Id.* at 85.

9 Other federal cases also cite the Government's right to withhold payment from its
10 prime contractors (and by extension the prime contractor's right to withhold payment
11 from a subcontractor) for unperformed or unsatisfactory work. See *AVCO Corp. v.*
12 *United States*, 10 Cl.Ct. 665 (1986) (withholding appropriate where work covered by an
13 invoice has not been properly accomplished).

14 Additionally, Alaska law supports the proposition that a party to a construction
15 contract is entitled to withhold payment based on another party's inability to perform its
16 obligations under the contract. *T. Ferguson Construction, Inc. v. Sealaska Corporation*,
17 820 P.2d 1058, 1061 (Alaska 1991), *citing Arctic Contractors, Inc. v. State*, 564 P.2d 30,
18 43 (Alaska 1977). In *Ferguson*, the court held that the project owner was entitled to
19 withhold payment from the contractor where the circumstances clearly showed that the
20 contractor would be unable to complete the project. The court determined that paying
21 the contractor under those circumstances would, in effect, be throwing good money
22 after bad, since "[t]he law does not require a useless act, particularly where, as here, it
23 would only enhance the actor's loss." *Ferguson*, 820 P.2d at 1061, *citing United States*
24 *v. Buffalo Coal Mining Co.*, 343 F.2d 561, 565 (9th Cir. 1965).
25

1 Also cited by the *Ferguson* court were cases from two other jurisdictions holding
2 that under appropriate circumstances (i.e., where a contractor has become clearly
3 unable to perform as promised) an owner may "assume control of the work, cause it to
4 be completed, and hold the contractor for his reasonable expenditures if in excess of
5 the unpaid balance of the contract price," *Mayer v. Alexander & Baldwin, Inc.*, 532 P.2d
6 1007, 1009 (Hawaii 1975), and that "[w]here a subcontractor is failing to perform on a
7 contract, the main contractor may step in and complete what has to be done, and the
8 defaulting party is entitled to receive payment for only that part of the work actually
9 performed," *Prince v. R.C. Tolman Constr. Co.*, 610 P.2d 1267, 1268 (Utah 1980).

10 In the present case, Spencer acknowledged that it was unable to perform as
11 required by its Material Contract. Spencer's inability to meet these requirements placed
12 the project in jeopardy, potentially creating significant liability for Nugget. As a
13 consequence, Nugget and Spencer entered into a Support Agreement whereby Nugget
14 would supply equipment and labor to the project to enable the project to proceed. The
15 Support Agreement explicitly provided that Nugget was entitled to deduct from partial
16 pay estimates earned by Spencer sufficient funds to keep the account of Spencer
17 current.

18 In light of the authorities discussed herein, it is apparent that Nugget did nothing
19 inappropriate in withholding payment from Spencer as a consequence of Spencer's
20 nonperformance of its obligations under the Material Contract. Thus, any statements,
21 testimony or evidence indicating to the contrary, would be unfounded and highly
22 prejudicial to the jury. Thus, North Star should be precluded from introducing any
23 evidence at trial intended to show that Nugget improperly "intercepted" or otherwise
24 retained monies to which Spencer was entitled.
25

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2 Dated: June 14, 2007

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of June, 2007,
a true and correct copy of the foregoing was served
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